LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 8 1963
JOHN F. DAVIS, CLERK

No. 908

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

BERNHARD ROSEE,

Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, a corporation; JAMES E. BAGGOT, JR., and DONALD W. MORRISON, individually and as a co-partnership, d.b.a. BAGGOT and MORRISON; HARRIS HAYWOOD; SIDNEY C. HAMPER; MARTIN H. MILEK; ROY C. LOFTUS; RICHARD ROSE; RAYMOND COMENZO and THOMAS H. HERR, individually and as members of the Arbitration Committee of the Board of Trade of the City of Chicago; and WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BERNARD H. SOKOL
One N. LaSalle Street
Chicago 2, Illinois
Attorney for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Opinion below	1
Jurisdictional statement	2
Questions presented	2
Statement of the Case	2
Pertinent statutes	4
Reasons for Granting the Writ	10
Appendix	
Opinion below	1a
Order affirming	9a
Order Petition for rehearing denied	10a

Authorities Cited.

Baldwin v. Morgan, 287 Fed. 2d. 750, 755	13
Baxter v. Board of Trade, 83 Ill. 146, 149	11
Board of Trade v. Nelson, 162 Ill. 431, 439; 44 N.E. 743, 745	11
Board of Trade v. Olsen, 262 U.S. 1	16, 17
Bostedo v. Board of Trade, 227 Ill. 90, 91, 81 N.E. 42, 43	11
Burton v. Welmington Parking Authority, 365 U.S. 715, 722	14
Carter v. Carter Coal Co., 298 U.S. 238, 56 Sup. Ct. 855, 80 L. Ed. 1160 (1936)	10
Coty, Inc. v. Hearn Department Stores, Inc., 158 Misc. 516, 284 N.Y. Supp. 909 (Sup. Ct. 1935)	10
cf. Cusack Co. v. Chicago, 242 U.S. 526, 37 Sup. Ct. 190, 61 L. Ed. 472 (1917)	10

PAGE

Daniel v. Board of Trade of Chicago (CA7) 164 Fed. 2d., 815, 819, 820 17

Estep v. United States, 327 U.S. 114, 120, 66 Sct. 423.... 15

Eubank v. Richmond, 226 U.S. 137, 33 Sup. Ct. 76, 57 L. Ed. 156 (1912) 10

Fisher v. Board of Trade, 80 Ill. 85, 87 11

Garner v. Louisiana, 368 U.S. 157, 183 14

Henderson v. United States, 339 U.S. 816, 70 S.Ct. 843, 94 L. Ed. 1302 15

Jones v. Fisher, 116 Ill. 68 13

Mitchell v. United States, 313 U.S. 80, 92, 61 S.Ct. 873, 85 L.Ed. 1201 15

Munn v. People of Illinois, 94 U.S. 113 17

Pacaud v. White, 218 Ill. 138, 147, 148, 75 N.E. 779, 781, 782 11

People ex rel. Page v. Board of Trade, 45 Ill. 112, 116, 118 11

People v. Board of Trade, 80 Ill. 134, 137 11

Pitcher v. Board of Trade, 121 Ill. 412, 419, 421, 13 N.E. 187, 188, 189 11

Pollak v. Public Utilities Commission, 191 Fed. 2 450 ..... 14, 15

Rochester Tel. Corp. v. United States, 307 U.S. 125, 142, 59 S.Ct. 754, 763, 83 L. Ed. 1147 15

Silver v. New York Stock Exchange—certiorari from the Court of Appeals of the Second Circuit, 302 Fed. 2d 714 (#150 current term) 15

Stock Exchange v. Board of Trade, 127 Ill. 153, 161, 163 16

Sturges v. Board of Trade, 86 Ill. 441, 442 11

PAGE

Wade v. Mayo, 334 U.S. 672, 681 12

Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 Sup. Ct. 50, 73 L. Ed. 210 (1928) 10

Weaver v. Fisher, 110 Ill. 146 13

STATUTES.

Commodity Exchange Act, as amended 7 U.S.C. 1-17
Secs. 5(a); 5(b); 6(b); (7a)(6) 4-7, 18

Illinois Statutes:
Chap. 5, Sec. 139 12
Civil Practice Act, Sec. 277 13
Chapter 110 13
Chap. 10, Secs. 105-115 12
Administrative Review Act, Sec. 151(a) 12

Session Laws of Illinois, 1859 pp. 13-15 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1962.

No.

BERNHARD ROSEE,

Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, a corporation; JAMES E. BAGGOT, JR., and DONALD W. MORRISON, individually and as a co-partnership, d.b.a. BAGGOT and MORRISON; HARRIS HAYWOOD; SIDNEY C. HAMPER; MARTIN H. MILEK; ROY C. LOFTUS; RICHARD ROSE; RAYMOND COMENZO and THOMAS H. HERR, individually and as members of the Arbitration Committee of the Board of Trade of the City of Chicago; and WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPINION BELOW.

The Court of Appeals' Opinion is dated January 2, 1963. Petition for rehearing was denied January 21, 1963. The Opinion is not yet reported. It is quoted in full in the Appendix.

JURISDICTION.

Jurisdiction is invoked under Section 1253, Chapter 24, U.S. Code.

QUESTIONS PRESENTED.

1. May a state grant judicial power to a corporation free of any standard of conduct governing due process?

2. Where a state grants a charter to a corporation through which the corporation exercises judicial power and in the exercise of such power the rudiments of fair play are ignored and where the State Courts habitually refuse judicial review, may the party aggrieved seek relief in the Federal Courts?

3. Is the public purpose of the Commodity Exchange Act affected by matters which relate to arbitrary conduct of the Board of Trade of the City of Chicago?

STATEMENT.

Bernhard Rosee, a member of the Board of Trade of the City of Chicago, filed suit in the District Court for the Northern District of Illinois asking relief from oppressive conduct of the Arbitration Committee of the Board under the 14th Amendment, Civil Rights Statutes, and the Commodity Exchange Act, 7 U.S.C. 1-17.

In general, the complaint set forth the delegation of judicial power by the State of Illinois to the Board of Trade, free of any restraint or requirement of due process and the exercise of that power in derogation of Rosee's property rights.

In reply to a motion to dismiss filed in the District Court, Plaintiff submitted authority in support of his assertion that he could not obtain relief in the State Courts.

The District Court granted the motion to dismiss on the ground that the complaint failed to establish federal jurisdiction, and on appeal the Court of Appeals affirmed.

The complaint of Rosee alleged:

1. His membership in the Board of Trade was his only source of income and he had been deprived of it wrongfully.

2. He had been publicly critical of activities of the officials of the Board of Trade and had testified before legislative committees in this regard; he had been harassed as a result.

3. A spurious claim had been presented against him by Baggott & Morrison, other members of the Board of Trade, through whom he had cleared his accounts.

4. He denied the claim.

5. He was given no choice by the Board of Trade; he was obliged to arbitrate or be suspended.

6. A hearing took place before the Committee of Arbitration of the Board of Trade which included the following experiences:

(a) The Committee allowed Baggot & Morrison to have counsel, a member of the Board of Directors of the Board of Trade. Rosee was refused right of counsel.

(b) The Committee refused to require production of records of account.

(c) The Committee allowed the attorney for Baggott & Morrison to act as chairman, examiner, and permitted him to direct some of the proceedings to Rosee's confusion and detriment.

(d) The Committee refused Rosee the right to present a counterclaim.

(e) The Committee refused to hear evidence of violations of the Commodity Exchange Act of Baggott & Morrison in the transaction.

(f) The Committee received evidence out of Rosee's presence.

(g) Two members of the Committee informed Rosee that they were voting against him prior to the occasion for presentation of Rosee's defense.

(h) The officers and directors of the Board of Trade improperly influenced the Committee.

7. Rosee alleged that he had asked the Commodity Exchange Authority to help him in his effort to procure the right to counsel and that his request was declined.

The petitioner, Rosee, is an individual in his late sixties.

PERTINENT STATUTES.

I. Commodity Exchange Act, As Amended, 7 U.S.C. 1-17a

"SEC. 5a. Each contract market shall—

"(1) promptly furnish the Secretary of Agriculture copies of all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein;

• • •

"SEC. 5b. The failure or refusal of any board of trade to comply with any of the provisions of this Act, or any of the rules and regulations of the Secretary of Agriculture thereunder, shall be cause for suspending for a period not to exceed six months or revoking the designation of such board of trade as a

"contract market" in accordance with the procedure and subject to the judicial review provided in paragraph (a) of section 6 of this Act.

"SEC. 6. Any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the above conditions, and with a sufficient assurance that it will continue to comply with the above requirements.

* * *

"(b) If the Secretary of Agriculture has reason to believe that any person (other than a contract market) is violating or has violated any of the provisions of this Act, or any of the rules and regulations made pursuant to its requirements, or has manipulated or it attempting to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any board of trade, he may serve upon such person a complaint stating his charges in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made directing that all contract markets until further notice of the Secretary of Agriculture refuse all trading privileges to such person, and to show cause why the registration of such person, if registered as future commission merchant or as floor broker hereunder should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Secretary of Agriculture or before a referee designated by the Secretary of Agriculture, which referee shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture. For the purpose of securing effective enforcement of the provisions of this Act, and for the purpose of any investigation or proceeding under this Act, the pro-

visions, including penalties, of the Interstate Commerce Act, as amended and supplemented (49 U.S.C. 12, 46, 47, 48), relating to the attendance and testimony of witnesses, the production of documentary evidence, and the immunity of witnesses, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture (or any person designated by him), the commission, and any referee designated pursuant to the provisions of this Act, and to any person subject thereto. Upon evidence received, the Secretary of Agriculture may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or as floor broker hereunder, may suspend, for a period not to exceed six months, or revoke, the registration of such person. Notice of such order shall be sent forthwith by registered mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the Secretary of Agriculture, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the Secretary of Agriculture be set aside. A copy of such petition shall be forthwith served upon the Secretary of Agriculture by delivering such copy to him, and thereupon the Secretary of Agriculture shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the Secretary of Agriculture, and the findings of the Secretary of Agriculture as to the facts, if supported by the weight of evidence, shall in like manner be conclusive.

* * *

"SEC. 8a. The Secretary of Agriculture is authorized—

• • •

"(6) to communicate to the proper committee or officer of any contract market and to publish, notwithstanding the provisions of section 8 of this Act, the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgment of the Secretary of Agriculture disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers and consumers."

II. Private Laws, Illinois, 1859, pp. 13-15, and Rules, Board of Trade, pursuant thereto

"SECTION 1. That the persons now composing the Board of Trade of the City of Chicago are hereby created a body politic and corporate, under the name and style of the 'Board of Trade of The City of Chicago,' and by that name may sue and be sued, implead and be impleaded, purchase, take, receive, acquire, own, hold, use, lease, sell, mortgage, pledge and otherwise deal in and with such real or personal property, including shares or other interests in or obligations of domestic or foreign corporations, associations, partnerships or individuals, or whatever nature or kind and of whatever amount or value may be necessary, suitable or proper to serve and accomplish the purposes of its organization; have a common seal, and alter the same from time to time; and make such Rules, Regulations, and By-Laws from time to time as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land.

• • •

"SECTION 4. The said corporation is hereby authorized to establish such Rules, Regulations, and By-Laws for the management of their business, and the mode in which it shall be transacted, as they may think proper.

• • •

"SECTION 6. Said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the Rules, Regulations, and By-Laws thereof.

"SECTION 7. Said corporation may constitute and appoint Committees of Reference and Arbitration, and Committees of Appeals, who shall be governed by such rules and regulations as may be prescribed in the Rules, Regulations or By-Laws for the settlement of such matters of difference as may be voluntarily submitted for arbitration by members thereof; the acting chairman of either of said committees, when sitting as arbitrators, may administer oaths to the parties and witnesses, and issue subpoenas and attachments, compelling the attendance of witnesses, the same as justices of the peace, and in like manner directed to any constable to execute.

"SECTION 8. When any submission shall have been made in writing and a final award shall have been rendered, and no appeal taken within the time fixed by the Rules or By-Laws, then, on filing such award and submission with the Clerk of the Circuit Court, an execution may issue upon such award as if it were a judgment in the Circuit Court, and such award shall thenceforth have the force and effect of such a judgment, and shall be entered upon the judgment docket of said court."

Pursuant to the foregoing Act, the Board of Trade adopted the following Rules:

"130. Suspension for Default.—Where a member fails or refuses to perform an exchange contract with or pay obligations arising out of such contracts to another member, the defaulting member, on complaint of the other member, shall be suspended until the contract is performed or the debt satisfied. Registered firms and corporations shall be deemed members under this Rule. If the member alleged to be

in default denies the default, he shall be entitled to have the claim arbitrated. If the claim is admitted or established by a final arbitration award, the defaulting member shall be suspended until he has satisfied and discharged all debts owing to members on exchange contracts. Application for reinstatement shall allege, under oath, that all such debts have been discharged, and notice of such application shall be posted on the bulletin board fifteen days prior to the hearing of such application.

* * *

"160. Professional Counsel Excluded.—No member of the Association shall have a right to be represented by professional counsel in any investigation or hearing before the Board or any Standing or Special Committee.

* * *

"185. Oath of Arbitrators.—Before taking office, the members of both Committees shall be sworn faithfully and fairly to hear, examine, and determine all controversies according to the principles of equity and justice and to make just and true awards according to the best of their understanding. Such oath may be administered by any person authorized to administer oaths.

"186. Conduct of Trial.—The Committee of Arbitration shall hear all evidence submitted by the parties relative to such controversy, which evidence shall be taken under oath or affirmation and shall be duly recorded. The member resisting the claim may make any defenses before the Committee which would be available to him in a court of law or equity.

"187. Award of Committee of Arbitration.—After such hearing, the Committee of Arbitration shall file its award in writing with the Secretary, who shall deliver copies thereof to all interested parties. Such award shall be rendered according to the facts disclosed by the evidence and according to the Rules and Regulations of the Association and the laws of the land."

REASONS FOR GRANTING THE WRIT.

I.

LACK OF DUE PROCESS AS A BASIS FOR THE EXERCISE OF CERTIORARI.

Can a state grant judicial power to a corporation and provide neither standards for the exercise of that power nor opportunity for judicial review where abuse of the power is charged?

In the first place, it is somewhat doubtful that a state can invest a private corporation with unbridled authority to make awards which have the force of judgments and upon which execution may issue.

It is certainly a fatal defect if no standards at all are set to guide private action. *Coty, Inc.* v. *Hearn Department Stores, Inc.*, 158 Misc. 516, 284 N.Y. Supp. 909 (Sup. Ct. 1935). A municipal ordinance conferring upon adjacent property owners unfettered discretion to determine the use of another's property may constitute denial of due process. *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116, 49 Sup. Ct. 50, 73 L.Ed. 210 (1928); *Eubank* v. *Richmond*, 226 U.S. 137, 33 Sup. Ct. 76, 57 L.Ed. 156 (1912); *cf. Cusack Co.* v. *Chicago*, 242 U.S. 526, 37 Sup. Ct. 190, 61 L.Ed. 472 (1917), and a statute enabling miners and operators to fix hours of work with no provision for impartial review is void since it enables a selfish majority to discriminate against an unwilling minority. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 56 Sup. Ct. 855, 80 L.Ed. 1160 (1936).

In the case of the Board of Trade, the only appeal provided for is in the Board itself—its individuals ap-

pointed by the same officers—unregulated by any standards of fair conduct, and unsupervised by a disinterested tribunal.

For over half a century, the Supreme Court of Illinois in an unbroken line of decisions has refused to interfere with the awards leading to membership suspension of the Committees of the Board of Trade for any reason whatsoever, either in equity or at law. *Board of Trade* v. *Nelson*, 162 Ill. 431, 439; 44 N.E. 743, 745; *Fisher* v. *Board of Trade*, 80 Ill. 85, 87; *Bostedo* v. *Board of Trade*, 227 Ill. 90, 91, 81 N.E. 42, 43; *People ex rel. Page* v. *Board of Trade*, 45 Ill. 112, 116, 118; *People* v. *Board of Trade*, 80 Ill. 134, 137; *Baxter* v. *Board of Trade*, 83 Ill. 146, 149; *Sturges* v. *Board of Trade*, 86 Ill. 441, 442; *Pitcher* v. *Board of Trade*, 121 Ill. 412, 419, 421; 13 N.E. 187, 188, 189; *Pacaud* v. *White*, 218 Ill. 138, 147, 148; 75 N.E. 779, 781, 782.

The reasoning is that by becoming a member, that person had voluntarily submitted himself to the operation of the Special Legislative Act and the rules adopted pursuant thereto; that he had thereby made a valid and binding agreement to submit questions in dispute connected with his membership to arbitration, which the courts were powerless to interfere with; and that the Board of Trade having been empowered by its charter to act judicially, its sentence concluded the matter and foreclosed review by any other judicial tribunal.

It has even been held that if the member had no notice of the hearing and had been unjustly suspended, a court of equity could not reinstate him, because the action of the Board is final and complete, and if it has erred in that action either on the merits or has acted in a case without justification, chancery cannot afford a remedy." *Fisher* v. *Board of Trade*, 80 Ill. 85, 87.

The Court of Appeals below suggested that in order to invoke federal jurisdiction, the Petitioner was obliged to pursue his remedies through the State Courts. Good judicial administration discourages futile procedures. *Wade* v. *Mayo*, 334 U.S. 672, 681.

II.

DENIAL OF EQUAL PROTECTION AS A BASIS FOR EXERCISE OF CERTIORARI.

The Illinois decisions not only deny due process; they deny equal protection of the laws. Section 8 of the Legislative Act incorporating the Chicago Board of Trade permits the filing of the award in the Circuit Court with all the force and effect of a judgment and authorizes the issuance of an execution thereon. The alleged debtor's assets are subject to sale; but the Illinois decisions deny him access to the same court to resist, even though his constitutional guaranties have been sacrificed in the process. (Compare Uniform Arbitration Act, 1 Ill. Rev. Stat. 1961, Ch. 10, Secs. 105-115.)

The rule making and judicial authority of the Board of Trade derives from a special act of the legislature and not from the general laws of Illinois.

A dramatic contrast can be found in the general laws, which regulate the marketing of perishable agricultural commodities. (Ill. Rev. Stats. Chap. 5, Sec. 139.)

In administrative hearings under this law (Sec. 150), an award of damages must be taken to a circuit or superior court in order that a judgment be rendered, and in such suits the court must proceed in all respects as in the usual suits for damages. Review is provided under the Administrative Review Act (Sec. 151a).

In Illinois administrative agencies are subject to rules of the Supreme Court of Illinois. (Ill. RS #266, Chap. 110.) The Civil Practice Act, which imposes the conventional requirements of judicial procedure, applies to such proceedings (Sec. 277).

In contrast, the Board of Trade is a power unto itself. When one considers that the members who sit in judgment on others are themselves competitors in the pits and they are not by law obliged to follow conventional standards of fair conduct, such license makes equal protection of the law a doubtful result.

Are the actions of the Board of Trade "state action" within the meaning of the 14th Amendment?

When private individuals or groups are endowed by the state with power and functions governmental in nature, they become instruments of the state and subject to the same constitutional limitations as the state itself. *Baldwin* v. *Morgan*, 287 Fed. 2d 750, 755. The Court of Appeals below stated that the proceedings of which the Petitioner complained were different from activities previously determined to constitute action under color of state law. This ignores the variety of the forms in which the law has been applied against discriminatory action.

The requirements of due process are not exclusively the reserve of Negroes, political heretics and tortured signers of confessions. The right to earn a living is a most precious one. Membership in the Board of Trade itself has been acknowledged to be a valuable property right. *Weaver* v. *Fisher*, 110 Ill. 146; *Jones* v. *Fisher*, 116 Ill. 68. Whether the arbitration was voluntary, as the Court of Appeals believed, or compelled, as the complaint asserted, there was a singular lack of fairness in the proceedings of the Board. The petitioner has been deprived of

a valuable right; he has been shamed and deprived by a group exercising authority conferred by the legislature of Illinois.

"Only by sifting facts and weighing circumstances can the now obvious involvement of the state in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722.

In *Pollak* v. *Public Utilities Commission*, 191 Fed. 2d 450, it was held that a rider on a privately owned public transportation system could obtain relief from being forced to listen to music while riding. One of the important considerations was that the firm had been given a "virtual monopoly."

The Board of Trade monopoly is not virtual—it is complete!

Where enterprises conceived as private property have been so used that they become affected with the public interest, the constitutional rights of persons may not be abridged through their use. In *Garner* v. *Louisiana*, 368 U.S. 157, 183, this Court described restaurants as having "a public consequence."

The status, influence, and function of each member of the Board of Trade was considered of sufficient "public consequence" to warrant provision in the Commodity Exchange Act respecting his suspension at the instance of the Commodity Exchange Authority.

In the instant case, Rosee appealed to the local Commodity Exchange Authority for aid when the Board of Trade refused him due process. When denied the right to employ counsel, he informed the Commodity Exchange Authority. No interest was inspired; no inquiry made; no help was extended.

Thus, the Authority confirmed by its behavior the view held in Illinois that a large area of jurisdiction remains "private" in the administration of the national exchanges, though injustice may result.

> "To suggest that a 'negative' order cannot be the final step in a misuse of government power is to assert a distinction the Supreme Court has repudiated. * * * An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status." *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 142, 59 S.Ct. 754, 763, 83 L.Ed. 1147. *Mitchell* v. *United States*, 313 U.S. 80, 92, 61 S.Ct. 873, 85 L.Ed. 1201; *Henderson* v. *United States*, 339 U.S. 816, 70 S.Ct. 843, 94 L.Ed. 1302. Even failure to enter any order may be a denial of constitutional rights." *Pollak* v. *Public Utilities Commission*, 491 F.2d 450, 455.

There is a need to define the area of public interest implicit in the Commodity Exchange Act.

The National Exchanges, whether supervised by the Commodity Exchange Act or the Securities Act, are invested with power that is far reaching and pervasive. If that power is abused, there must be an opportunity for judicial review. Even where the statute is silent on the question of judicial review, this is not decisive. *Estep* v. *United States*, 327 U.S. 114, 120, 66 S.Ct. 423.

This Court now has pending before it a case involving arbitrary action by the New York Stock Exchange (*Silver* v. *New York Stock Exchange*—*certiorari* from the Court of Appeals of the Second Circuit, 302 Fed. 2d 714 (#150 current term.)). One of the important elements in the case was the holding of the Court of Appeals

that, even where jurisdiction might not be available under the Sherman Act, arbitrary action by the Exchange was not without remedy. While not applicable in terms of jurisdiction, the public consequence of administrative acts seems unquestioned. Certainly, these are not described as the private matter of a corporation.

In its construction of the Commodity Exchange Act, the Court of Appeals below unduly restricted the concept of "federally created rights and duties." The general purpose of the Commodity Exchange Act was to remove burdens on interstate commerce, caused by manipulation, market controls and the abuse stemming from a concentration of economic power. *Board of Trade* v. *Olsen*, 262 U.S. 1. Throughout its history, and it has been much in the courts, the Board of Trade of the City of Chicago has argued that it is a mere private corporation and that its business, in its own words, is "essentially private." *Stock Exchange* v. *Board of Trade*, 127 Ill. 153, 161, 163. In that case, an early Illinois court was constrained to say:

> "For many years the board has so used its franchises, and its members have so conducted their business, as that it has become of vast commercial influence, and fixes the market values of grain and agricultural products for a large territory, and the fluctuations in prices upon its floors powerfully affect the market prices of the necessaries of life throughout the country and the world. The great power and influence which the board possesses in dictating market values, are owing to the vast aggregation of products which are drawn to its portals for a market, and are bought and sold upon its floors, and which pay tribute and toll, in the shape of commissions, to its members. *The great bulk of this business,—though in form, and as between the members, the mere private and individual dealings of such mem-*

> ***bers,—is in reality the business of the numerous producers, consumers, merchants and shippers for and on behalf of whom these members deal.*** (Emphasis added.)

In the case of *Munn* v. *People of Illinois*, 94 U.S. 113, this Court recognized and followed the doctrine that when private property is devoted to a public use, and becomes affected with a public interest, it ceases to be *juris privati* only, and is subject to public regulation.

A factor in the influence of the Board is the integrity of its administration. This has been recognized by the Court of Appeals of the Seventh Circuit.

> "In the promulgation of its regulations, the Board acted in the conduct of the prudential affairs of the Board as any corporation would act in determining corporate policy. Because of the Board's relation to the public, it must, as we have said before, act with the utmost objectivity, impartiality, honesty, and good faith. It owes that duty not only because it is affected with the public interest, but because of the complete confidence reposed in it by its members, and the further fact that the directors, governors, and officers of the Board and Clearing may themselves be members of the market, and as such have to act where their own private interests are concerned. * * * The limitations of its power is to be found in its utmost *bona fides* of action under the rules, by-laws and regulations." *Daniel* v. *Board of Trade of Chicago* (CA7), 164 Fed. 2d 815, 819, 820.

The Chicago Board of Trade cannot conduct its business without authorization from the Secretary of Agriculture. *Board of Trade* v. *Olsen, supra.* Its regulations and by-laws must be filed with the Secretary of Agriculture (Sec. 5a(1)).

The alleged matters which the Arbitration Committee refused to consider as a part of the Petitioner's defense and counterclaim were frauds within the meaning of Section 6(b) of the Commodity Exchange Act.

There is authority in the Act to suspend members and to suspend the Board itself (Secs. 5b; 6(a), 6(b), Commodity Exchange Act, as amended), which authority is exercisable by the Commodity Exchange Authority.

Even in affairs described as "internal", the national exchanges are not instruments of private power and concern. They behave and are treated much like public utilities. The fair administration of the Board of Trade of Chicago is a matter of public concern, whether the question arises on the initiative of the Commodity Exchange Authority or at the insistence of an aggrieved party who cannot obtain relief in the state courts.

The courts of Illinois have made the Board of Trade an island. The Commodity Exchange Authority considers some of its affairs "off limits". Only the action of this Court will bring the Board of Trade back into the legal province of the United States.

Respectfully submitted,

BERNARD H. SOKOL,
Counsel for Petitioner

APPENDIX.

In the
United States Court of Appeals
For the Seventh Circuit

No. 13857 September Term and Session, 1962

Bernard Rosee,
Plaintiff-Appellant,
v.
The Board of Trade of the City of Chicago, a corporation; James E. Baggot, Jr., and Donald W. Morrison, individually and as a co-partnership, d.b.a. Baggot and Morrison; Harris Haywood; Sidney C. Hamper; Martin H. Milek; Roy C. Loftus; Richard Rose; Raymond Comenzo and Thomas H. Herr, individually and as members of the Arbitration Committee of the Board of Trade of the City of Chicago; and Warren W. Lebeck, individually and as Secretary of the Board of Trade of the City of Chicago,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 2, 1963

Before Schnackenberg and Castle, Circuit Judges, and Grubb, District Judge.

Grubb, District Judge. This is an appeal from an order of the district court dismissing the amended complaint herein for want of jurisdiction under the Civil Rights Statutes, 28 U. S. C. A., Section 1343, and 42 U. S. C. A., Section 1983, and the Commodity Exchange Act, 7 U. S. C. A., Sections 1 to 17.

Appellant, Bernard Rosee, a trader member of the Chicago Board of Trade, cleared his transactions through the firm of Baggot and Morrison. In June 1960, Rosee and Baggot and Morrison disputed the status of Rosee's account, and a claim against Rosee for $13,654.41 was received by the Board of Directors. At Rosee's request, the dispute went to the Arbitration Committee of the Board which rendered an award against Rosee who then appealed to the Board's Committee of Appeals. This committee affirmed the award. Rosee refused to abide thereby and was suspended from membership pursuant to the rules of the Board.

Rosee then filed suit in the Superior Court of Cook County, seeking reinstatement to membership in the Board. After denial of a request for a temporary mandatory injunction compelling his reinstatement, Rosee took a voluntary nonsuit in the state action and thereafter commenced the instant case. He alleges, as he did in the state action, that he was denied a fair hearing in the Board proceedings which ultimately resulted in the suspension of his membership. On motion of the defendants-appellees, the district court held that the amended complaint did not plead sufficient facts to establish federal jurisdiction.

Rosee contends that he has been deprived of a valuable property, membership in the Board of Trade, without due process of law, and that he has been denied the equal protection of the laws. The acts complained of—the allegedly arbitrary and discriminatory proceedings before the Board—are claimed to have been performed under color of state law in that the Board actions were pursuant to legislation providing for the incorporation of the

Board and for authorization of said Board to make rules and regulations for its government. Additional state action allegedly infringing Rosee's constitutional rights is claimed to lie in the past refusal of the courts of Illinois in other cases to review the validity of proceedings conducted pursuant to the rules of the Board resulting in suspension of membership.

Although incorporated under a special act of the Illinois legislature in 1859, the Chicago Board of Trade is a voluntary association of individuals endowed with the ordinary powers and privileges of a private corporation. *Thomson* v. *Thomson*, 293 Ill. 584 (1920), 127 N. E. 882, 273 U. S. 638, dismissing writ of error to the Illinois Supreme Court.

Pursuant to its legislative charter, the Board is authorized to make rules and regulations proper and necessary for its government and the management of its business. The corporation is further empowered to admit to or to expel from membership such persons as it sees fit, in the manner to be prescribed by its rules, regulations, and by-laws. It may constitute and appoint committees of reference and arbitration for the settlement of such disputes as are voluntarily submitted by its members.

The Board proceedings involving Rosee are founded on the agreement of the parties as members of the Board to exercise the right of voluntary submission of a dispute to arbitration. In the performance of the proceedings pursuant to legislative grant and its own rules, the Board was not authorized, nor did it in fact exercise a governmental or public function. It acted in the affairs of its own government and internal business as a private corporation and exercised "the inherent and implied power which is a necessary and inseparable incident of its existence." *Thomson* v. *Thomson*, *supra*, at 590.

The nature of the proceedings affecting Rosee's account and membership status differs from the activities which have been determined to constitute state action

or action under color of state law. In *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673 (1930), the activities of a state tax commission were in issue; in *Barsky* v. *Board of Regents,* 347 U. S. 442 (1954), those of a state teacher licensing board. *Truax* v. *Raich,* 239 U. S. 33 (1915), involved threatened enforcement by state officers of an allegedly unconstitutional state law. *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), and *Barrows* v. *Jackson,* 346 U. S. 249 (1953), were concerned with enforcement of infringement of constitutional rights by state judicial systems.

Actions arising under the Railway Labor Act, 45 U. S. C. A., Section 153, must be distinguished. Unlike the instant action, these cases are not concerned with rights arising under private agreements. These actions involve the determination of federally created contractual rights as between common carriers and their employees. The federal courts have jurisdiction under proper circumstances to review the validity of the determinations of these rights by agencies created pursuant to federal legislative mandate, whose proceedings thereby partake of a "public" character. *Edwards* v. *Capital Airlines, Inc.,* 176 F. 2d 755, 760 (D. C. Cir. 1949), cert. denied 338 U. S. 885; *Arnold* v. *United Air Lines, Inc.,* 296 F. 2d 191 (7th Cir. 1961).

Considerations as to the governmental or private character of conduct allegedly infringing the complainant's constitutional rights are stated in *Baldwin* v. *Morgan,* 287 F. 2d 750 (5th Cir. 1961), a railway terminal segregation case. The challenged activity was by a terminal, pursuant to state law and state public service commission order. In determining the liability of the terminal, the court notes that it is a public utility, doing something the state deems useful for the public necessity or convenience. The court continues at page 755:

> "* * * When in the execution of that public function it is the instrument by which state policy is to be, and is, effectuated, activity which might otherwise be deemed private may become state action within the Fourteenth Amendment. And whether it is

state policy is to be determined by the nature of the activity in terms of the governmental nature of the function • • •."

The activities of the Board of Trade, in light of the definition set forth in *Baldwin* v. *Morgan, supra,* do not fall within the category of governmental action. The Board is not a public utility; it has not been established that the Board performs something which the state deems useful for the public necessity or convenience in the settlement of disputes between its members and in diciplinary actions concerning its membership. These activities, pursued in accordance with its rules and regulations, are private in nature. The claimed invalidity does not pose a question of infringement of constitutional rights cognizable in the first instance by the federal courts.

Further it is claimed that there is state action infringing Rosee's constitutional rights in the refusal of the courts of the State of Illinois to review Board of Trade proceedings involving disciplinary actions of its members. It has been stated in *Board of Trade of City of Chicago* v. *Nelson,* 162 Ill. 431, 440 (1896), 44 N. E. 743, 746, that the court will not review the facts of proceedings had upon due notice and inquiry, and "there is no question of jurisdiction or legality of proceedings" in which a member "stands convicted by the sentence of a tribunal of his own choice." No case has been cited or found in which an Illinois court reviewed proceedings before the Board of Trade resulting in suspension of membership.

The policy of the Illinois courts with respect to review of Board of Trade disciplinary proceedings, whether it be an absolute refusal to review as claimed by Rosee or whether it is based on the considerations as stated in *Board of Trade of City of Chicago* v. *Nelson, supra,* does not constitute state action resulting in denial of due process or the equal protection of the laws to Rosee. Rosee commenced a state action on substantially similar

allegations as those found in the complaint herein. After denial of his request for a preliminary injunction, he voluntarily dismissed the state case and turned to the federal court. Neither the adjudication in the Superior Court of Cook County nor prior adjudications involving the rights of other persons present a final adjudication of Rosee's rights by a state court. Unless or until an arm of the state, such as the state judiciary, becomes implicated directly in the alleged abridgement of Rosee's constitutional rights, no federal question is presented. See the comment in the dissenting opinion in *Black* v. *Cutter Laboratories*, 351 U. S. 292 (1956), at 302, to the effect that implication of the state courts by affirmance of allegedly discriminatory contracts involves governmental action controlled by the Constitution of the United States, thereby presenting a federal question as in *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), and *Barrows* v. *Jackson*, 346 U. S. 249 (1953).

The case of *Doud* v. *Hodge*, 350 U. S. 485 (1956), is not applicable here. There it was held that a three-judge district court had jurisdiction under Title 28 U. S. C. A., Sections 1331, 2281, and 2284, to enjoin enforcement by state officials of an allegedly unconstitutional state statute even though the state courts had not yet rendered a definitive decision as to the meaning or federal constitutionality of the statute. The case is concerned not with the basic question of jurisdiction but with the propriety of passing on the constitutionality of the state statute.

The court concurs in the opinion of the learned district judge that "Plaintiff's complaint relates at best only incidentally to the Commodity Exchange Act." It may be noted that the Board of Trade is subject to federal regulation under the Act because transactions on such boards are involved in interstate commerce and are affected with a national interest. The Act proscribes certain practices by members of a board or contract market and provides the sanction of criminal penalties. The statute does not expressly provide for civil enforcement of any correlative rights corresponding to the statutory duties.

The general purpose of the Commodity Exchange Act was to remove burdens on interstate commerce caused by manipulation and market controls. *Board of Trade of Kansas City* v. *Milligan*, 90 F. 2d 855 (8th Cir. 1937), cert. denied 302 U. S. 710. The proscription of fraudulent contracts creates public rights, as is manifested by criminal sanctions provided by the statute. In this respect the Act may be deemed to differ from the Railway Labor Act which is primarily concerned with the amicable disposition of labor disputes between a carrier and its employees for the ultimate purpose of avoidance of stoppages of interstate commerce. This statute creates duties and rights, among them the freedom of choice in the selection of representatives for the respective parties. The Supreme Court held this duty to be enforceable without a specific statutory provision for a judicial remedy. *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548 (1930), where the party for whose benefits the rights had been created sought to enforce them. A similar decision was reached in *Texas & Pacific Railway Co.* v. *Rigsby*, 241 U. S. 33 (1916), involving the federal Safety Appliance Act, and *Leedom* v. *Kyne*, 358 U. S. 184 (1958), concerning rights under the National Labor Relations Act in respect to *ultra vires* action of the Board for which no express statutory remedy was provided. In each of these cases, the issue involved enforcement of federally created rights and duties directly related to the purposes of the legislation. Judicial enforcement, although not expressly provided for, was deemed to be necessary for the implementation of the legislative intent in enactment of the statute. In the instant case, it does not appear that Congress contemplated the judicial remedies of injunction and accounting by means of review of arbitration and disciplinary proceedings involving fellow members before the Board as a means of implementing the legislative purpose of the Commodity Exchange Act in proscribing misleading and fraudulent trade transactions.

Appellant has failed to establish that there has been infringement of his constitutional rights by state action or under color of state law, or that the Commodity Exchange Act provides a civil remedy for review of arbitration and disciplinary proceedings by the Board of Trade. For these reasons, it is the conclusion of the court that Rosee has not pleaded sufficient facts to establish federal jurisdiction. The order of the district court dismissing the amended complaint herein for want of jurisdiction must be and it hereby is Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Wednesday, January 2, 1963

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Latham Castle, Circuit Judge

Hon. Kenneth P. Grubb, District Judge

BERNHARD ROSEE, *Plaintiff-Appellant,* vs. THE BOARD OF TRADE OF THE CITY OF CHICAGO, a corporation, et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 13857	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court dismissing the amended complaint herein for want of jurisdiction, in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Monday, January 21, 1963

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Latham Castle, Circuit Judge

Hon. Kenneth P. Grubb, District Judge

BERNHARD ROSEE, Plaintiff-Appellant, vs. BOARD OF TRADE OF THE CITY OF CHICAGO, et al., Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 13857	

IT IS ORDERED by the Court that appellant's petition for a rehearing of this cause be, and the same is hereby DENIED.

A True Copy:

Teste:

/s/ Kenneth J. Carrick
Clerk, United States Court of Appeals
for the Seventh Circuit.

(Seal)